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80-6339
NO. 80-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

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NATHEN BROWN,

Petitioner,

-v.-

STATE OF GEORGIA,

Respondent.

==========

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

==========

DOUGLASS CUTCLIFFE
225 Central Park West, #419
New York, New York 10024

ATTORNEY OF RECORD

QUESTIONS PRESENTED

1. Whether the appointment of counsel by the State, to represent co-defendants in separate trials where the death penalty is sought, deprives a defendant of effective assistance of counsel and violates constitutional standards of due process of law guaranteed by the Fifth, Sixth, and Fourteenth Amendments?

2. Whether the exclusion for cause of fifty-five (55) veniremen from the jury panel because they voiced general objections to or conscientious scruples against imposing capital punishment violates the defendant's right to a fair and impartial jury and deprives him of due process of law guaranteed by the Sixth and Fourteenth Amendments to the Constitution?

3. Whether the imposition of the death penalty upon a finding of aggravating circumstances that the offense was "outrageously or wantonly vile, horrible, or inhuman in that ... it involved torture, depravity of mind, or aggravated battery to the victim" as applied in this case violates constitutional standards for capital sentencing established by the Eighth and Fourteenth Amendments to the Constitution?

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Petitioner, Nathen Brown, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia in this case.

Citation of Opinion Below

the opinion of the Supreme Court of Georgia, Brown v. State of Georgia, ___ Ga. ___, 275 S.E.2d 52 (1981) is set out in Appendix A and attached hereto.

Jurisdiction

The judgment of the Supreme Court of Georgia was entered on February 24, 1981. A timely petition for rehearing was denied on March 11, 1981. On April 30, 1981, Justice Powell granted petitioner's motion to extend the time in which to file this petition for writ of certiorari to and including June 9, 1981. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3), petitioner having asserted below and asserting herein deprivation of rights guaranteed by the United States Constitution.

Constitutional and Statutory Provisions Involved

This case involved the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and Ga. Code Ann. § 27-2534.1(b)(7), which provides in relevant part:

> In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:
>
> * * *
>
> (7) The offense of murder ... was outrageously and wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim.

STATEMENT OF THE CASE

Petitioner, Nathen Brown, a young black male, was convicted of the murder of Bonnie Bullock, of armed robbery, of aggravated assault, of possession of a firearm during the commission of a crime, and of the kidnapping with bodily injury of both Bonnie Bullock and Henry Phillips on May 31, 1979. Petitioner was sentenced to consecutive sentences of death for the armed robbery, murder, and kidnapping; five years imprisonment for possession of a firearm; and ten years imprisonment for aggravated assault. The Georgia Supreme Court, on appeal, set aside petitioner's death sentence for armed robbery and remanded with the direction that he be resentenced to life imprisonment in that count. The court also reversed petitioner's conviction of aggravated assault because it is an included offense of kidnapping with bodily

injury.[1/]

On the night of July 26, 1976, the service station where Henry Phillips worked, in Taliaferro County, Georgia, was robbed by the petitioner and his co-defendants, Judson Ruffin and Jose High. Phillips and his 11-year-old son, Bonnie Bullock, were kidnapped and taken to a deserted road. There, Henry Phillips and Bonnie Bullock were told to lie face down on the ground in front of their assailant's automobile. Bonnie Bullock was shot in the head and died instantly. Henry Phillips survived gun wounds to the head and arm.

The only evidence adduced at trial connecting petitioner with the offense was the direct testimony of Henry Phillips and the confession of petitioner, Nathen Brown, which was introduced over the objection of the defendant. This evidence revealed that the only contact petitioner had with either victim came when Henry Phillips got out of the trunk of the car and grabbed for his son. Nathen Bown poked Mr. Phillips in the stomach with a shotgun, telling him to get back. (R. 164, 185). Petitioner said nothing further to either victim during the entire transaction. There is no evidence from the testimony of Mr. Phillips, from that of the ballistic witnesses, or from petitioner's confession that Henry Phillips or Bonnie Bullock were shot by a shotgun. In fact, the petitioner was in back of the car looking for a rope to tie up the victims when they were shot by his co-defendants.

Petitioner received court appointed counsel to represent him. His counsel at trial and on appeal to the Georgia Supreme

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1/ Brown v. State, ___ Ga. ___, 275 S.E.2d 52, 57 (1981).

Court was also appointed to represent his co-defendants Jose High and Judson Ruffin. Jose High later retained independent counsel. Judson Ruffin was convicted and sentenced to death in a separate trail. The Georgia Supreme Court affirmed in Ruffin v. State, 243 Ga. 95, 252 S.E.2d 472 (1979).

Jury selection began in petitioner's trial on May 29, 1979. Fifty-five veniremen (55) were excused for cause from the jury panel because they expressed reservations over the imposition of capital punishment. The trial court denied petitioner's challenge to the array of the jury panel made at the close of voir dire (R. 104).

The jury returned a verdict of guilty on all six indictments. In its instruction to the jury during the sentencing phase of the trial, the trial court charged the jury that in order to impose the death penalty they must find the existence of at least one of the statutory aggravating circumstances under § (b)(7). He also told them it was within their discretion to consider mitigating circumstances and grant life imprisonment. The judge did not define or explain the statutory terms of "outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim." During its sentencing deliberations the jury returned to ask questions about the charge three times during a 50 minute period. The jury returned a sentence of death on four of the six counts, finding the aggravating circumstances of torture or depravity of mind.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. On appeal to the Georgia Supreme Court, the petitioner urged in Enumeration of Error 3 that Fleming v. Georgia, 246

Ga. 90, 270 S.E.2d 185 (1980) mandates the appointment of separate and independent counsel to represent co-defendants when the death penalty is sought. (Brief of Appellant p. 12). The Supreme Court of Georgia rejected petitioner's contention on the grounds that there was no actual conflict of interest demonstrated in this case and that the Fleming rule was a formulated under the supervisory powers of the court. It was, therefore, prospective only according to the court. (Brown v. State, surpa, at 55) The Court noted that no timely defense objection was made nor was there any prejudice shown.

2. The petitioner argued in Enumerations of Error 5, 6, and 8 on appeal to the Supreme Court of Georgia that the exclusion for cause of fifth-five (55) veniremen because of general objections to the death penalty left the petitioner with a "hanging jury panel" in violation of due process standards established in Withersooon v. Illinois, 391 U.S 510 (1968). The petitioner additionally challenged the entire panel as not being a fair cross-section of the community (Brief of Appellant pp. 13-15).

The Georgia Supreme Court rejected petitioner's argument as without merit upon review of the transcript of the voir dire conducted at trial. The court found that all veniremen indicated that they could not impose the death penalty under any circumstances. The court rejected petitioner's challenge to the array of the jury after the Witherspoon exclusions as untimely and without merit. The court stated that

> A defendant is entitled to an array of properly drawn impartial jurors to which he may direct his peremptory challenges. A party is entitled to this as a matter of right but conversely he is entitled to no more. Brown v. State, supra, 275 S.E. 2d at 56.

3. In Enumerations of Error 1, 2, 4, and 15, the petitioner raised on appeal to the Georgia Supreme Court that the court erred in denying petitioner's motion for a new trial based on violation of standards for sentencing in capital cases established in Godfrey v. Georgia, 446 U.S. 420 (1980). Petitioner argued that: the trial court failed to place a limited construction upon Section 27-2534.1(b)(7) in its charge to the jury leaving the jury without any guidance in the exercise of its sentencing discretion (Brief of Appellant pp. 11-12); that the instruction itself was insufficient to advise the jury of their discretion not to impose the death penalty; and that the jury instructions did not provide a meaningful basis for distinguishing the few instances where the death penalty is imposed from the bulk of the cases where it is not imposed as required by Furman v. Georgia, 408 U.S. 238, 313 (1972) (Brief of Appellant, pp. 12-13). Counsel also asserted that because of the inadequate supervision of the jury's sentencing discretion, the imposition of the death penalty in this case was arbitrary and capricious in violation of the Godfrey standard. Counsel maintained that the evidence established that petitioner did not pull the trigger which injured Henry Phillips or killed Bonnie Bullock; he committed no vile, inhuman or tortuous act against Bonnie Bullock; and there was no evidence that petitioner had possession of a .32 caliber pistol, the murder weapon. In mitigation of petitioner's act, he was 19 years

old at the time of the incident, was a student, and had no prior criminal record. (Brief of Appellant pp. 12, 18).

The Supreme Court of Georgia found that the evidence supported the verdict of the jury beyond a reasonable doubt and that these enumerations of error were without merit. Although petitioner was not the triggerman, the court found that he was present and participated in all aspects of the crime. Upon review of the record, the court found that the verdict was not imposed under the influence of passion, prejudice, or other arbitrary factors and that the murder was outrageously or wantonly vile, horrible or inhuman in that it is distinguishable from ordinary murders for which the death penalty is not appropriate. Brown v. State, supra, 275 S.E.2d at 55, 57-59.

REASONS FOR GRANTING THE WRIT

I.

> The Court should grant certiorari to consider whether the appointment of counsel, by the State, to represent co-defendants in separate trials where the death penalty is sought deprives the defendant of effective assistance of counsel and violates constitutional standards of due process of law guaranteed by the Fifth, Sixth, and Fourteenth Amendments.

This Court has held that joint representation of co-defendants in criminal cases may result in a serious conflict of interest. The right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments is fundamental to due process of law. Therefore,

> "... whenever a trial court improperly requires joint representation over timely objection reversal is automatic. ... The right to have the assistance of counsel is too

> fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Holloway v. Arkansas, 435 U.S. 475, 488 (1978).

When there is no timely objection at trial by the defendant, the Court in Cuyler v. Sullivan, 446 U.S 335, 346-47 (1980) has held that the defendant ..."must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." Once defendant shows that a conflict of interest actually affected te adequacy and effectiveness of his representation he need not demonstrate prejudice to obtain relief from his conviction Cuyler v. Sullivan, supra, 446 U.S. 349-50.

The conflict of interest arising from joint representation of co-defendants inherently exists in capital cases. While the same set of facts may go to the issue of guilt or innocence of co-defendants, the sentencing portion of the trial calls for presentation of mitigating circumstances. Apart from the character evidence peculiar to a defendant, the precise circumstance of his involvement in the crime constitute the most significant determining factors in the sentencing discretion of the jury. An attorney who represents two co-defendants is caught in a precarious postion. He/she cannot ethically divulge the confidintial communications of the co-defendant even though such information may tend to mitigate the defendant's participation in the crime. The attorney's loyalties and responsibilities toward his/her client are inalterably divided. Under these circumstances an attorney cannot effectively represent his/her clients and, as a result, a defendant sentenced to death is deprived of his/her life without due process of law.

The Supreme Court of the State of Georgia recognized the conflict of interest implicit in joint representation in capital cases. In Fleming v. State, 246 Ga. 90, 270 S.E.2d 185, 188 (1980), the court said,

> ..."We therefore hold that, where the state seeks the death penalty, against any one defendant in a criminal transaction, he and his co-defendants must be provided with separate and independent counsel Such a rule is especially necessary where the death penalty is sought, because in these cases even a slight conflict, irrelevant of guilt or innocence, may be important in the sentencing phase." (emphasis added)

The direction from the court is mandatory. In Fleming the co-defendants were tried separately. Upon full disclosure by counsel, the co-defendants waived their right to separate representation by counsel. However, the Georgia Supreme court held that a defendant cannot waive such a conflict of interest. The interests of justice outweighed the defendant's right to choose his own counsel.

In the instant case, the state initially appointed counsel to represent all three co-defendants upon their indictment. Counsel was later relieved of representation of one of the co-defendants who retained his own counsel. He represented petitioner's co-defendant, Judson Ruffin, who received a death sentence (See Ruffin v. State, 243 Ga. 95, 252 S.E.2d 472 (1979).

The mandate of Fleming v. State, supra, unequivocably establishes that separate counsel must be provided to co-defendan s where the state seeks imposition of the death penalty. Due process requires such separate representation even in the presence of a waiver of this fundamental right.

of the trial. Accordingly the Court should grant certiorari to determine whether due process requires reversal of petitioner's conviction and death sentence under the Sixth and Fourteenth Amendments.

II

The Court Should Grant Certiorari To Consider Whether The Exclusion for Cause of Fifth-five (55) Veniremen From the Jury Panel Because They Voiced General Objections to or Conscientious Scruples Against Imposing the Death Penalty Violates Petitioner's Right to a Fair and Impartial Jury and Deprives Him of Life Without Due Process of Law as Guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

This Court established constitutional standards for jury selection in capital cases in Witherspoon v. Illinois, 391 U.S. 510 (1968). In that case, the Court held that

> ... a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death. Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected."

Witherspoon v. Illinois, supra, 391 U.S. at 521-523.

When a prospective juror voices a general objection to the death penalty Witherspoon makes it incumbent upon the trial court to inquire into the nature of that objection before granting a challenge for cause. The court must determine whether the jurors' scruples would ..."invariably compel them to vote against capital punishment" or whether they could put aside their personel views and obey their

The Supreme Court of Georgia held in Brown v. State, supra, that petitioner was not deprived of due process because no timely objection was raised prior to trial and no material prejudice was demonstrated by the petitioner in this case. The court attempted to limit the Fleming rule as an exercise of the court's supervisory powers over the bar of the State of Georgia and was therefore prospective only. Counsel was appointed prior to the Fleming case and therefore the defendant was not a beneficiary of it. (Brown v. State, supra, at 55).

The rule of separate representation of counsel established in Fleming v. State, supra, addresses the fundamental due process rights of the accused. It is not merely a means of supervising attorneys practicing in the State of Georgia. The Fleming rule goes to the procedural constitutional rights of defendants just as the representation rules developed in Holloway v. Arkansas, supra, and Cuyler v. Sullivan, supra. The deprivation of petitioner's life without due process of law cannot be justified merely as a prospective application of a state procedural rule.

The Georgia Supreme Court, moreover, erred in its holding that petitioner must demonstrate material prejudice if no timely objection was raised at trial. Brown v. State, supra, 275 S.E.2d at 55. This Court held in Cuyler v. Sullivan, supra, that once a conflict of interest is demonstrated there is no need to show prejudice to obtain relief. Petitioner has demonstrated a conflict of interest in his counsel representing his co-defendant, depriving him of effective assistance of counsel during the sentencing phase

oaths as jurors to uphold the laws of the State. Id. at 515 n.7. "Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position." Id. at 525 n.9.

Where prospective jurors are eliminated from the jury panel when they have not unambiguously stated they would automatically vote against imposition of the death penalty the defendant is left with a jury uncommonly willing to condemn a person to die. This not only deprives the defendant of a jury composed of a representative cross-section of the community but allows the State to stack the deck against the defendant. This Court held that a defendant who receives a death sentence by a jury so selected is deprived of his life without due process of law. Such a jury does not meet the standards of impartiality to which a defendant is entitled under the Sixth and Fourteenth Amendments.

In Davis v. Georgia, 429 U.S 122, 339 (1976) this Court reversed the death sentence of a defendant when only one venireman was excluded in violation of Witherspoon. The Court stated that ..."if a venireman is improperly excluded even though not so committed, any subequently imposed death penalty cannot stand." Davis v. Georgia, supra, 429 U.S. at 123.

In the instant case, fifty-five (55) veniremen were excluded for cause because they voiced general objections to capital punishment. The trial court's brief interrogation of these veniremen was insufficient to establish that they could not fulfill their duties as jurors and they were

summarily dismissed from the panel. The trial judge badgered certain prospective jurors into stating they could not impose the death penalty under any circumstances, as in the case Europe Manago, Jr. set out below:

Mr. Goolsby: Anyone else? Are you opposed to capital punishment?

Juror Europe Manago, Jr.: Well, I would have to say I am.

Mr. Goolsby: Does that mean that under no circumstances would you render the death penalty?

Mr. Manago: Well, the way that I feel about it is death is something that man can't control.

Mr. Goolsby: I understand that ---

Mr. Manago: I understand that I would be willing to say whether a man ---

Mr. Goolsby: Does that mean then that you, under no circumstances --- That you are so opposed to it that you could not render a death penalty verdict?

Mr. Manago: I don't think I could.

Mr. Goolsby: You don't think you could.

The Court: Do I understand you to say that under no circumstances, regardless of what the facts are, could you impose the death penalty?

Mr. Manago: Well, I would be ---

The Court: Please give me a direct answer, if you please, and then I might give you a chance to explain. But do you mean to say that under no circumstances, regardless of what the facts are, could you impose the death penalty? Is that what you mean?

Mr. Manago: I will have to say yes.

The Court: All right.

Mr. Goolsby: I believe he'd be disqualified.

The Court: Mr. Hardin?

Mr. Hardin: We can't agree to it, Your Honor. We'd like to note an exception as to his qualifications for the record.

The Court: All right. Well, he says under no circumstances could he impose ---

Mr. Goolsby: Let me do it this way --- let me go another way. Anyone else under that general ---

The Court: Wait a minute, now. State your name so the Reporter will get it ---

Mr. Manago: Europe Manago, Sr.

The Court: Yes, he's disqualified. Let him step from the jury box. (R. 8-10). This venireman clearly did not exhibit an irrevocable conviction before the trial to vote against the death penalty. The court forced the prospective juror into expressing a commitment against capital punishment without giving him an opportunity to explain, in his own words, his feelings about the death penalty. This Court has held that

> "If the voir dire testimony in a given case indicates that veniremen were excluded on any broader basis than this the death sentence cannot be carried out even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrower ground of exclusion." Witherspoon v. Illinois, supra, at 522 n.21; Boulden v. Homan, 394 U.S. 478, 482 (1969); Maxwell v. Bishop, 398 U.S. 262, 266 (1970).

The voir dire testimony in the instant case indicates that veniremen who may have been willing to consider all penalties provided by the laws of the state of Georgia were summarily excluded in violation of Witherspoon.

Furthermore, forty-four veniremen were excluded after no more than the following questioning by the court:

> The Court: Are you conscientiously opposed to capital punishment?
>
> [Juror Response]
>
> The Court: Are you so opposed to it that you could not vote for the death penalty under any circumstances?
>
> [Juror Response]

Such questioning did not appraise the prospective juror of his/her duty to set aside any personal objections against capital punishement and uphold the laws of the state. Nor does this line of questioning reveal an unambiguous conviction to vote against the death penalty in this particular case. The petitioner's right to a trial by an impartial jury representing a cross-section of the community imposed the serious responsibility on the judge to extensively interrogate prospective jurors during voir dire to insure that the State does not cross the line of neutrality and impanel a hanging jury.[2/]

The jury panel remaining after the exclusions in violation of Witherspoon underrepresented those who would reserve capital punishment for extreme cases. Since most of those veniremen who were so excluded for cause were black, the panel was also underrepresented by blacks.

2/ Witherspoon indicates that a fair cross-section of the community includes those who are in favor of capital punishment and those who would hesitate to impose it except in extreme cases. "culled of all who harbor doubt about the wisdom of capital punishment -- of all who would be reluctant to pronounce the extreme penalty -- such a jury can speak only for a district and dwindling minority." Id., at 520.

The petitioner was sentenced to death by a jury unconstitutionally selected under the standards established in Witherspoon v. Illinois, supra, in violation of his rights to a fair and impartial jury and due process of law under the Sixth and Fourteenth Amendments. Accordingly, this Court should grant certiorari to determine whether petitioner's death sentence was imposed by an unconstitutionally composed jury.

III.

The Court Should Grant Certiorari To Consider Whether the Imposition of the Death Penalty Upon a Finding of Aggravating Circumstances That the Offense Was "Outrageously or Wantonly Vile, Horrible, or Inhuman in That it Involved Torture, Depravity of Mind, or Aggravated Battery to the Victim" As Applied In this Case Violates Constitutional Standards For Capital Sentencing Established By The Eighth and Fourteenth Amendments.

This Court has consistently held that capital punishment cannot be imposed under sentencing procedures which create a substantial risk that such punishment will be inflicted in an arbitrary and capricious manner. See, e.g., Furman v. Georgia, 468 U.S. 238 (1972); Gregg v. Georgia, 428 U.S. 153 (1976); Godfrey v. Georgia, 446 U.S 420 (1980). In order to avoid arbitrary and capricious impositions of the death penalty, the sentencing scheme must provide a ..."meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not." Furman v. Georgia, 408 U.S. at 313 (White, J., concurring). States have the responsibility to obviate "standardless" discretion in sentencing. The death penalty statutes themselves tend to be vague providing no guidance as to the jury's exercise of

its sentencing discretion. The result is a pattern of unconstitutional sentencing. Therefore a State,

> "...must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'"

Godfrey v. Georgia, supra, 446 U.S at 428.

Under the capital punishment statute in Georgia, the death penalty cannot be imposed absent a finding of at least one of the statutory aggravating circumstances. These statutory terms are vague at best and do not provide the jury with an inherent guidance as to when the offense is so outrageously vile or inhuman so as to merit the sentence of death. This court held in Godfrey v. Georgia that unless a jury is given careful guidance concerning the meaning of § (b)(7)'s terms, their interpretations of the statute can only be the subject of speculation.

In the instant case, the trial court failed to give adequate instructions to the jury during the sentencing phase of the trial to guide the discretion of the jury in determining the petitioner's sentence. The judge charged the jury that in order to impose a sentence of death they must find, beyond a reasonable doubt, the existence of one or more of the statutory aggravating circumstances of torture, depravity of mind, or an aggravated battery to the victim. The court, however, offered no explanation of the meaning of these statutory terms.

The judge instructed the jury that even if they found the existence of one or more of the aggravating circumstances it was within their discretion to recommend life for the

petitioner. The jury instructions strongly suggested that it was their duty to impose the death sentence with a cursory discretion to recommend life. This is diametrically opposed to the system appoved in Gregg. Capital punishment is to be reserved for only extreme circumstances. Although the judge instructed the jury that capital punishment was not mandatory upon a finding of aggravating circumstances, this was clearly not the impression given the jury.

The inadequacy of the jury instruction is demonstrated by the fact that the jury's finding of aggravating circumstances is not supported by the evidence in this case. There is no evidence of torture of either victim, nor is there evidence of depravity of mind. Neither Bonnie Bullock nor Henry Phillips were subjected to serious physical abuse.[3/] Bonnie Bullock died instantly. The Georgia Supreme Court nevertheless found serious psychological abuse because Bonnie Bullock, an 11-year-old child, pleaded for his life prior to his death. The court held that this plus the victim's age and physical characteristics supported the jury's finding of torture and depravity of mind beyond a reasonable doubt. Brown v. State, supra, 275 S.E.2d at 58.

There was no evidence produced at trial that the victim was held captive for an extended period of time, or was repeatedly tormented with the prospect of his impending death sufficient to warrant a finding of serious psychological

---

3/ This Court noted in Godfrey v. Georgia, supra, 446 U.S. at 431 that

> "'torture', must be construed in pari materia with 'aggravated battery,' so as to require evidence of serious physical abuse of the victim before death.'

torture. The murder of an 11-year-old child disturbs the ordinary person; however, the age and physical characteristics of the victim in themselves do not constitute evidence of torture or depravity of mind so as to establish beyond a reasonable doubt the existence of aggravating circumstances.

Likewise there was no evidence here of an aggravated battery upon the murdered victim. No aggravating circumstances exist to set the instance murder apart from ordinary murder where the death penalty is not imposed.

This Court has held that doubts regarding the jury's sentencing considerations due to defective instructions should be resolved in favor of the accused. Sandstrom v. Montana, 442 U.S. 510, 526 (1979); Andres v. United States, 333 U.S 740, 752 (1948). This applies with added force in capital cases because of the need for reliability in determining the appropriateness of death as punishment. See, e.g., Woodson v. North Carolina, 428 U.S 280 (1976).

The trial court did not adequately guide the discretion of the jury in imposing death. Accordingly, the Supreme Court should grant certiorari to determine whether petitioner was sentenced to death in violation of the constitutional sentencing standards established in Godfrey v. Georgia, supra, and in violation of the Eighth and Fourteenth Amendments.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

Douglass Cutcliffe

Dated: June 9, 1981

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ATTORNEY OF RECORD

N. Brown (051) 2/24/81
GSC

In the Supreme Court of Georgia

Decided: FEB 24 1981

36813. BROWN v. THE STATE.

MARSHALL, Justice.

The appellant was tried and convicted for the offenses of murder, armed robbery, aggravated assault, possession of a firearm during the commission of a crime, and two counts of kidnapping with bodily injury. He was sentenced to death for armed robbery, murder and the two counts of kidnapping. He was sentenced to five years on the possession-of-firearms conviction, and he was sentenced to ten years for the aggravated-assault conviction, these sentences to run consecutively. This is a companion case to High v. State, Ga. (SE2d) (1981) (Case No. 36689) and Ruffin v. State, 243 Ga. 95 (252 SE2d 472) (1979), where the facts are amply set out.

I. Enumerations of Error

1. Although the appellant enumerates the general grounds as Enumeration 1, his argument also goes to the issues raised in Godfrey v. Georgia, 446 U.S. (100 SC 1759, 64 LE2d 398) (1980) and Fleming v. State, 246 Ga. 90 (270 SE2d 185) (1980). The appellant was positively identified by the surviving victim of the crimes. In addition, the appellant made a complete and full confession. His fingerprints were found on the car identified as the vehicle used in the robbery after it was located by authorities.

The evidence amply supported the verdict of the jury beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (99 SC 2781, 61 LE2d 560) (1979). We find no merit in this enumeration of error. Enumerations of error 2, 4 and 15 also raise the Godfrey issue, which will be dealt with in the sentence review portion of this opinion.

2. In his third enumeration of error, the appellant contends that since his attorney was appointed to represent both

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himself and his co-defendants, Ruffin and High, the death penalty cannot be imposed, citing Fleming v. State, supra.

Counsel represented the appellant's co-defendant, Ruffin, and the appellant. However, the other co-defendant, High, retained other counsel prior to trial. In Fleming v. State, supra, this court, by the authority of its supervisory power over the bar of this state, created a broad rule in cases in which the death penalty is sought. Under the rule of Fleming, the same attorney shall not represent co-defendants in cases in which the death penalty is sought. Fleming v. State, supra, was decided June 9, 1980, and the appellant's trial began on May 29, 1979. The rule of Fleming v. State, in that it is based on the court's supervisory power, is prospective only. In that case, this court found an actual conflict of interest. In the instant case, no actual conflict of interest has been shown. "Whenever a trial court improperly requires joint representation over timely defense objection, reversal is automatic." Holloway v. Arkansas, 435 U.S. 475, 488 (98 SC 1173, 55 LE 426) (1978). However, "in order to establish a violation of the Sixth Amendment, a defendant who raises no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 48 U.S.L.W. 4517, 4521 (1980); Fleming v. State, supra. "A mere possibility of conflict is insufficient to impugn a criminal conviction amply supported by competent evidence." Montgomery v. State, Ga. App. (Case No. 60634, decided October 16, 1980). In the case under review, there was no timely defense objection nor was there any objection by the state, as was the case in Fleming v. State, and no material prejudice has been demonstrated. The disqualification of an attorney to represent co-defendants must be raised prior to trial, otherwise any disqualification could result in manufactured error. This enumeration of error is without merit.

3. In Enumerations of error 5 and 6, the appellant contends that the trial court erred in excusing 55 prospective jurors based on Witherspoon v. Illinois, 391 U.S. 510 (88 SC 1770, 20 LE2d 776) (1968).

Without naming the jurors disqualified as being unalterably opposed to the imposition of the death penalty, we have reviewed the transcript of the voir dire, and all the prospective jurors stated that they could not impose the death penalty under any circumstances. Defense counsel agreed in almost all instances with the trial court that they were disqualified under the rule in Witherspoon.

The appellant also argues that the qualification of potential jurors under Witherspoon v. Illinois resulted in a "hanging jury panel" of 42 jurors. The same objection was raised by counsel in Ruffin v. State, supra, and was decided adversely to his position. This enumeration of error is without merit. Ruffin v. State, supra; Dampier v. State, 245 Ga. 427 (7) (265 SE2d 565) (1980); Harris v. Hopper, 243 Ga. 244 (253 SE2d 707) (1979); Spinkelink v. Wainwright, 578 F2d 582 (5th Cir. 1978).

Additionally, the appellant attacks the array and asserts that blacks were underrepresented after the Witherspoon exclusions. Pretermitting that the challenge to the array was not timely, the appellant's argument is without merit. "A defendant is entitled to an array of properly drawn impartial jurors to which he may direct his peremptory challenges. A party is entitled to this as a matter of right but, conversely he is entitled to no more." High v. State, supra, and cits.

4. In Enumeration of error 7, the appellant contends that the trial court erred in allowing both GBI agents Ingram and Monahan to remain in the courtroom after the rule of sequestration had been invoked. Both agents worked together

on the initial investigation and interrogation of the defendant after his arrest. The district attorney stated in his place that both agents Ingram and Monahan were needed to assist him in the trial of the case. We find no abuse of discretion by the trial court in allowing both agents to remain in the courtroom. Ruffin v. State, supra; High v. State, supra, and cases cited.

5. In Enumeration of error 9, the appellant contends that the trial court erred in admitting testimony of a .32-caliber bullet when there was no evidence that defendant had in his possession any weapon on the night in question. The bullet was retrieved from the body of one of the victims.

The defendant in his statement said, "Judson got .32 and walked up to the booth . . . I got out with single-barreled shotgun" and "loaded .32 revolver with different shells in Augusta." The defendant was also identified by the surviving victim as having a shotgun at the time of the robbery, and at the time he was removed out of the trunk of the car and shot. There was evidence that, at various times during the criminal enterprise, various participants had actual possession of one of the three weapons involved. The evidence complained of was a relevant and necessary part of the state's case, and the trial court did not err in admitting it.

6. Enumeration of error 10 is expressly abandoned. In Enumerations of error 11, 12 and 13, the appellant contends that the trial court erred in overruling his three motions for mistrial made during the sentencing phase of the trial. The defendant testified during the sentencing phase of his trial, and when cross-examined about his participation in the crimes charged, the defendant elected to stand on his Fifth Amendment right. The appellant, having already been convicted of the crimes, had no presumption of innocence. He stood before the sentencing jury as a convicted felon. He chose to testify in

his own behalf as to sentence, but refused to respond to the state's cross-examination, asserting his Fifth Amendment right. This is not an instance in which the state has commented on a failure of a defendant to testify in his own behalf. It was not error of the district attorney to comment on this in argument to the jury. The district attorney's remark during argument, that "if his boys were treated like this, I don't know whether I'd want a jury to decide it," did not amount to such improper argument as would require a mistrial where the trial court on motion for mistrial instructed the jury to disregard the remark, and the district attorney voluntarily withdrew it. The prosecution may argue for a death sentence and offer plausible reasons for his position. See Rini v. State, 236 Ga. 715 (3) (255 SE2d 234) (1976); Chenault v. State, 234 Ga. 216 (215 SE2d 223) (1975); Brand v. Wofford, 230 Ga. 750 (9) (199 SE2d 231) (1973).

II. Sentence Review

7. We have reviewed the record and sentence in this case as mandated by the statute, and find that the verdict of the jury was not imposed under the influence of passion, prejudice or any other arbitrary factor. Code Ann. § 27-2537(c)(1).

8. We agree with the appellant's contention that Count 2 of the indictment, possession of a firearm during the commission of a crime, merged with Count 1 of the indictment, armed robbery. As was noted in High v. State, supra, (12) "whereas here, the evidence discloses that the crime of armed robbery was committed with the same firearm as that for which the appellant is charged with possessing, the lesser crime of possession of a firearm during the commission of a crime is included in the greater crime of armed robbery." Citing Crumbley v. State, 235 Ga. 540 (221 SE2d 13) (1975); Roberts v. State, 228 Ga. 298 (185 SE2d 385) (1971); and Code Ann. § 26-506.

9. We note as part of our independent review, as was noted in the companion case of High v. State, that the appellant received a death penalty for both the armed robbery from the person of Henry Phillips, Count 1 of the indictment, and kidnapping with bodily injury of Henry Phillips, Count 4 of the indictment. The death sentence received by the appellant under Count 1 and Count 4 of the indictment must therefore be set aside and remanded to the trial court with direction that the appellant be resentenced to life imprisonment as to Count 4 of the indictment, and that the trial judge sentence the appellant for the offense of armed robbery as provided by law. High v. State, supra.

The indictments and proof in this case are identical to the indictments and proof in High v. State, the companion case. The evidence of the murder of Bonnie Bulloch, Count 5 of the indictment, can be used as the basis for the separate conviction of the murder count and also as the basis for the conviction of kidnapping with bodily injury to the murder victim. High v. State, supra, and cits. As we said in High v. State, supra, in Potts v. State, 241 Ga. 67 (243 SE2d 510) (1978), the defendant was convicted for the murder of Michael Priest and kidnapping with bodily injury of Michael Priest. The bodily injury alleged was the killing of the victim. We held in Potts that as a matter of fact, as well as a matter of law, the murder of the victim and the kidnapping of the victim with bodily injury were not included offenses so as to bar the defendant from being prosecuted and subsequently convicted of both crimes. This conclusion was reached because neither of the crimes could have been established by proof of the same or less than all of the facts required to establish the commission of the crime charged. Code Ann. § 26-505(a). The murder required a finding of malice aforethought, but the kidnapping required no such finding. The kidnapping required a finding of unlawful abduction, while such a finding is not necessary for the conviction for murder. We here follow the

rule established in Potts and hold that the conviction and sentence of death for murder and kidnapping with bodily injury must be affirmed.

The same rationale does not apply to the conviction for kidnapping with bodily injury and the conviction for aggravated assault of Henry Phillips. This is true because the elements of the crime of aggravated assault must have been proved in order to sustain a conviction for the crime of kidnapping with bodily injury. Therefore, the aggravated assault in this case is an included offense of the crime of kidnapping with bodily injury, and the conviction for aggravated assault is reversed. Williams v. State, 238 Ga. 244 (232 SE2d 238) (1977).

10. The jury returned a finding of the following statutory aggravating circumstance: "The offense of murder and/or armed robbery and/or kidnapping was outrageously or wantonly vile, horrible and inhuman in that it involved torture, depravity of mind and an aggravated battery to the victim. Code Ann. § 27-2534.1(b)(7).

Under the evidence in this case, the appellant and his two co-conspirators planned the armed robbery of the service station with the express intent to eliminate any witnesses to the crime. They kidnapped the manager of the station along with his 11-year-old stepchild at gunpoint. The young boy, Bonnie Bulloch, was 56 inches tall and weighed 70 pounds. The stepfather was placed in the trunk of the car while the young boy rode inside the vehicle with his abductors. The appellant in his confession admitted that, as they drove the victims to an area in which they could be executed, Jose High taunted the young boy with the prospect of his own death to the point that the boy was begging for his life. When the robbers reached the execution site, the boy's

stepfather attempted to go to him, but was struck in the stomach by the butt of a shotgun wielded by the appellant. Both victims in the case were forced to lie on their faces on the ground in front of the automobile at gunpoint and were shot in the head in a cold-blooded, execution fashion. According to the appellant's statement, as the three then drove away from the site, they laughed about the murder. All of the conspirators were laughing, and the appellant related to the others, "we ain't got nothing to worry about, they're both dead." One of the conspirators told the appellant that he put three .32-caliber bullets into the boy's head and two into the man's head. The appellant then told Jose High that he should not have cut loose with both barrels of his shotgun, as "one should have been enough with those .32's."

Evidence of psychological abuse to the victim before death where it is shown to have resulted in severe mental anguish to the victim in anticipation of physical harm, may amount to serious physical abuse (i.e., torture to the victim) and will support a finding of depravity of mind of the defendant. Hance v. State, 245 Ga. 856 (268 SE2d 339) (1980). In determining whether the evidence shows "depravity of mind," the age and physical characteristics of the victim may be considered. Hance v. State, supra; Thomas v. State, 245 Ga. 683 (266 SE2d 499) (1980); High v. State, supra. From the evidence presented at trial in this case, this court finds that the serious psychological abuse to the victim prior to death, in view of the victim's age and physical characteristics, supports beyond a reasonable doubt the jury's finding of torture and depravity of mind on the part of the appellant. High v. State, supra; Code Ann. § 27-2537(c)(2). The appellant, while not the actual triggerman, was present and actively participated in all aspects of the crime, including the psychological torture of the victim. This court further finds, as was the case in

High v. State, that this murder of the 11-year-old victim was outrageously or wantonly vile, horrible or inhuman in that it is distinguishable from ordinary murders for which the death penalty is not appropriate.

The evidence in this case factually substantiates and supports the finding of the aggravating circumstance as to the kidnapping with bodily injury and the murder of the victim and the sentences of death, by a rational trier of fact beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (99 SC 2781, 61 LE2d 560) (1979).

11. We have thoroughly reviewed the instruction of the trial court during the sentencing phase of the trial and find that the charge was not subject to the defects dealt with in Fleming v. State, 246 Ga. 90, supra, and Hawes v. State, 240 Ga. 327 (240 SE2d 833) (1977).

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed for murder. The appellant by his own admission was an active participant in all aspects of an armed robbery, two kidnappings and the murder of a young child. We find these similar cases set forth in the appendix in addition to those similar cases set forth in the appendix to the companion case of Ruffin v. State, supra, support the affirmance of the death penalty. Contrary to the appellant's position, juries have given the death penalty in cases in which the defendant has no prior criminal record and was of a young age. Stevens v. State, 245 Ga. 583 (266 SE2d 194) (1980); Tucker v. State, 244 Ga. 721 (261 SE2d 635) (1979); Isaacs v. State, 243 Ga. 744 (257 SE2d 247) (1979); Gibson v. State, 236 Ga. 874 (226 SE2d 63) (1976).

We find that these similar cases set forth in the appendix, in addition to those similar cases set forth in

the appendix to the companion case of Ruffin v. State, supra, support the affirmance of the death penalty. After careful review in considering both the crime and the defendant, we find no material difference between the appellant's case and the companion cases of Ruffin v. State, supra, and High v. State, supra, insofar as the imposition of the death penalty is concerned. The appellant's sentences to death for kidnapping with bodily injury and for murder are not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Code Ann. § 27-2537(c)(3).

12. We find no prejudice to the defendant by a resentencing as to certain counts of the indictments or the reversal of other counts of the indictment, as the evidence of such crimes was necessarily before the jury. Collier v. State, 244 Ga. 553 (261 SE2d 364) (1979); High v. State, supra.

Judgment affirmed in part, vacated and remanded in part. All the Justices concur, except Hill, J., who concurs in the judgment only as to Divisions 4 and 9, and Gregory, J., not participating.

APPENDIX.

Ruffin v. State, 243 Ga. 95 (252 SE2d 472) (1979); Patrick v. State, 245 Ga. 417 (265 SE2d 553) (1980); Dannier v. State, 245 Ga. 427 (265 SE2d 565) (1980), addendum: 245 Ga. 882 (268 SE2d 349) (1980); Fair v. State, 245 Ga. 868 (268 SE2d 316) (1980); High v. State, Ga. (1981) (Case No. 36689).